IN THE

Supreme Court of the United States

OCTOBER TERM, 1941—No. 806.

PAUL E. MANHEIM, as a Committee, and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee,

Petitioners,

against

VAN S. MERLE-SMITH, *et al.*, J. P. MORGAN, *et al.*, and J. HERBERT CASE, *et al.*, Contracting Committees, THE CITY OF NEW YORK, the TRANSIT COMMISSION and all other parties to Plan and Agreement to end the receivership of Interborough and Manhattan Companies, THOMAS E. MURRAY as Interborough Receiver and WILLIAM ROBERTS, Receiver of Manhattan Railway Company,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Preliminary Statement.

The petition herein is filed by two parties: Manheim as a holder of Second Mortgage Bonds of Manhattan Railway Company and as attorney-in-fact for certain other minority

holders of such Bonds, and The Chase National Bank of the City of New York as Trustee of that issue. As is shown by pages 28 and 29 of the petitioners' Brief and as was aptly stated by Judge Swan in the Court below (R., p. 955):*

> "The Chase Bank, however, is only a nominal appellant, having taken its appeal at the demand of Manheim and only in order to enable him to obtain consideration by the court of arguments advanced by him against certain orders to which he was not a party. No independent contentions are presented by the Bank and its appeal requires no discussion independent of that devoted to Manheim's appeal * * *."

Indeed, as a result of action taken under provisions of the Manhattan Second Mortgage authorizing a majority of the bondholders to control the enforcement of their mortgage, the Chase Bank actually helped to bring about the results of which Manheim complains.

This brief in opposition to the petition is submitted upon behalf of (1) the Transit Commission of the State of New York, the agency charged by statute with the duty of preparing and adopting the Interborough-Manhattan Unification Plan, under which the properties of Interborough Rapid Transit Company and of Manhattan Railway Company were conveyed to the City of New York; (2) the City of New York; (3) the Contracting and Assenting Committees under the Plan; (4) the trustees under certain Manhattan and Interborough indentures; and (5) the Interborough and Manhattan receivers.

The decrees and orders here in issue brought eight years of most complex and burdensome litigation to a termination—a termination which has been deemed advan-

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* The opinion below is reported at 122 F. (2d) 454.

tageous by everyone concerned except Manheim and one Salomon, who has filed a separate petition for a writ of certiorari (No. 811, October Term, 1941). So complex is the unique factual background of this receivership, including numerous involved and interrelated documents, that such able and experienced Judges as Julian W. Mack and Robert P. Patterson each referred to it as the most complicated matter with which he had ever been faced. There is little wonder, therefore, that Manheim, who did not appear in this litigation until after the City made public its unification offers on June 23, 1939, has been able to present only a fragmentary and distorted statement of the facts in his petition and brief. And since the issues which he seeks to raise are essentially factual, it cannot be too greatly emphasized that his factual statement is not only inadequate but is also in part materially misleading. A statement of the more important facts upon which Judge Patterson's decrees and orders were founded is, therefore, necessary.

The Facts.

At the outset, we wish to expose two fundamental fallacies which underlie Manheim's brief.

First, he maintains that Manhattan's stockholders were preferred at the expense of Manhattan's Second Mortgage Bondholders. They were not. Manhattan's physical properties were sold in foreclosure for $17,000,000 under the prior lien of the Consolidated Mortgage, which was in default as to both principal and interest in the amount of $44,244,000. Thus the Second Mortgage Bondholders had a standing only as general creditors of Interborough. And Manhattan's stockholders were long ago held by the New York State Courts to be direct contractual creditors of

Interborough by virtue of a guarantee stamped on their stock certificates by Interborough ten years before the Second Mortgage Bonds were issued. (See Point II, *infra*). As Judge Swan said after referring to the New York cases (R., p. 959):

> "Consequently the Manhattan stockholders did not receive anything as stockholders, but rather as general creditors of Interborough—a position the same as the Manhattan Second Mortgage bondholders, who themselves were participating only as general creditors of Interborough—all Manhattan physical assets having been exhausted by the Manhattan Consolidated Mortgage prior lien."

Secondly, Manheim attempts to convey the impression that, under the Unification Plan, there was available for distribution to security holders the sum of $164,000,000,* in which he, a non-assenting security holder, is entitled to share *pro rata*. This, too, is at odds with the facts. The Unification Plan contained a series of offers, separately negotiated by the City and the Transit Commission with each class of Interborough and Manhattan security holders, to exchange their securities upon certain stated terms. This was not a case in which physical properties were purchased for a lump sum. As partial proof of this, the City was required to make deliveries of Corporate Stock and cash only to the extent that securities were actually deposited under the Plan (R., Vol. II, fol. 1420 ff); deposited shares of stock were actually transferred of record to the name of

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* The Plan called for the issuance of an aggregate of $151,248,187.18 principal amount of Corporate Stock, assuming 100% assent by security holders. To this Manheim adds $6,700,000 of cash actually constituting part of the trust estates under two of the mortgages prior to the adoption of the Plan, as well as $6,029,078.31 to be retained out of the receivership cash for payments in lieu of interest on certain senior securities.

the City†; and both of the Courts below pointed out that, had the Plan been disapproved on the ground of stockholder participation, it would have been amended to drop out such participation with a saving to the City and without a corresponding advantage to any other class of security holders.

Manheim refused to exchange his securities on the terms offered by the City. Instead, he chose the alternative of being paid in cash his distributive share on a strict enforcement of his legal rights. His legal rights having proved less valuable than what was offered him by the City, he now seeks to disguise the true nature of the Unification Plan, and to portray it as a lump sum purchase in which he may participate. The error in this was clearly exposed by Judge Swan as follows (R., p. 961):

> "The record reveals that the City desired not only to acquire the property but also to satisfy security holders without eliminating any class. To this extent the participation of security holders can be viewed as offers made to them by the City in fulfillment of its program of unification, rather than a participation by them in a lump valuation of the corporation's assets."

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† This is among the facts showing the incorrectness of Manheim's assertion that the Manhattan Company purchased its own securities under the Plan. It is another example of his factual errors. No creditor of Manhattan had any dealings, direct or indirect, with Manhattan, its Board of Directors, or any representative of its stockholders regarding the participation of such creditor under the Plan. The Plan prices were not determined as Manheim says, again erroneously, "as a result of negotiations between groups of security holders" (Brief, pp. 3, 8); the negotiations as to price were conducted by each group of security holders with the City and the Transit Commission. Manheim's reference to this Unification Plan as a "liquidation" is founded upon such false premises as we are here analyzing, and the word "liquidation" does not become a weighty argument merely because of his insistent repetition of it.

(a) *The status of the Receivership Proceedings.* The Interborough subway lines were owned by the City of New York. They had been constructed and provided in greater part by funds of the City, and were operated by Interborough under operating or franchise contracts with the City. The principal properties owned by Interborough and pledged under its mortgages thus consisted of these contracts. The principal elevated lines in the Boroughs of Manhattan and the Bronx were owned by Manhattan Railway Company. In 1903 the elevated lines of Manhattan were leased to Interborough for a term of 999 years at a rental which included taxes, interest on all Manhattan bonds and guaranteed dividends on the Manhattan stock. Thereafter the Interborough and Manhattan properties were operated by Interborough or its receivership estate until June 12, 1940, when the City acquired these properties under the Unification Plan.

The eight years of the receivership were by no means happy ones for Interborough and Manhattan security holders. They were spent in protracted and expensive litigation, most of which centered around one chief question: the tangle of relationships between the two companies, their security holders and the City arising out of the various franchises, contracts and related certificates under which the transit properties had been constructed, leased and operated, including the Manhattan lease, which the Interborough receiver attempted to disaffirm.

When the Unification Plan entered the picture, this litigation had not been finally settled. The Circuit Court of Appeals had held in *Murray* v. *Roberts,* 103 F. (2d) 889 (1939), petition for certiorari dismissed per stipulation, 311 U. S. 720 (1940), that the Interborough receiver had certain franchise obligations to the City requiring him to

operate trains over parts of the Manhattan lines, and that he could disaffirm the Manhattan lease only if he could at the same time discharge Interborough's obligations to the City in a manner satisfactory to it. The Interborough parties applied for a writ of certiorari from this decision. Unification intervened prior to a decision on that application. Consequently, unification occurred at a time when the City was in a recognized position to affect materially and substantially the relative rights and obligations of the security holders of both Interborough and Manhattan by its decisions of policy on the question of operation. Both courts below emphasized the dominant and stragetic position occupied by the City as a result of this disaffirmance decision. As stated by Judge Swan, the effect of the decision was that (R., p. 953):

> "* * * because of certain franchise obligations to the City the lease could not be disaffirmed unless, as a result of negotiations with the City, these obligations could be performed by some means other than affirmance. This decision established the City's strategic position in the affairs of the companies and enabled it to prepare to press its unification objective."

Extensive but uncompleted litigation had also been had of the question of determining a proper formula for ascertaining the compensation to which Manhattan was entitled for the use of its lines by the Interborough receiver; of the value and extent of the claims and counterclaims totalling many millions of dollars which were asserted by the Manhattan parties against the Interborough parties, and *vice versa,* under the Manhattan lease; of the many millions of dollars of unpaid real estate and special franchise taxes on Manhattan properties which were due the City of New

York; and of the claims totalling many millions of dollars which the City asserted through the Transit Commission against the receiver for his alleged failure to account for earnings due to the City under the contracts pursuant to which the properties were operated.

Furthermore, the earnings of these properties had rapidly gone from bad to worse. The elevated earnings had been so poor as to show large operating losses even before the payment of taxes. The earnings of the entire system, after taking into account the substantial deficits from the operation of the elevated division, had fallen from $13,500,000 in 1935 to $6,400,000 in 1939. These earnings were insufficient even to provide for the interest and sinking fund requirements of the Interborough First and Refunding Mortgage Bonds, the interest and sinking fund of which went into default on January 1, 1939.

(b) *The Adoption of the Unification Plan.* Fortunately for the security holders of these two companies, the unification in City ownership and operation of all the rapid transit lines had long been the objective of both the State and the City.

The Transit Commission, which is a branch of the Public Service Commission of the State, wholly independent of the City, for half a century had been charged with the duty of supervising the development and operation of the City's rapid transit facilities. By Chapter 134 of Laws of 1921 the Legislature enacted what is now Article VII of the Public Service Law, pursuant to which the Transit Commission was directed to prepare a plan or plans of unification for the improvement of rapid transit in the City.* The

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* For the convenience of the Court, the relevant portions of this Article are set forth in an appendix to this brief.

Legislature declared that such a course was necessary to relieve the public emergency then existing.

The Legislature directed the Commission to make "the necessary studies and investigation" before preparing a plan. To accomplish this the Commission could and did use its existing powers to hold hearings and subpoena witnesses. The statutory mandate also provided (§123[2]) that "the commission shall outline an arrangement whereby outstanding securities of the railroad companies may be retired * * *." Furthermore, the duty was expressly enjoined upon the Commission by §123(4) of causing a valuation or valuations to be made of whatever transit facilities were to be included in a plan.

From 1921 until the adoption of the present Plan the Transit Commission worked continuously on this problem. Numerous tentative plans were prepared by the Commission after the making of extensive studies and valuations, but none of these was ever adopted. Then, on January 1, 1939, there took effect a new Article VIII, §7-a, of the State Constitution which had as its sole purpose the prompt accomplishment of unification. That provision authorized the City to issue, outside of its debt limit, securities in the principal amount of $315,000,000 for the acquisition of transit facilities and transit securities.

This new section of the Constitution vested in the City another power of even greater novelty and importance. Prior to January 1, 1939, the City had been expressly forbidden by Article VIII, §10, of the Constitution (now Article VIII, §1) to "become directly or indirectly the owner of stock in, or bonds of, any association or corporation." By the amendment, however, the City was authorized to acquire transit securities and to issue its own securities

directly to the holders of transit securities. This power made possible the adoption of the present Plan, calling for an exchange of Interborough and Manhattan securities for City securities and cash.

Following these changes in the Constitution, the Mayor and the Transit Commission re-opened negotiations with representatives of the various classes of security holders. These negotiations came to a head in the summer of 1939. Agreement was then reached with representatives of many classes of security holders upon the terms of a tentative Plan, which was prepared and promulgated by the Transit Commission with the cooperation of the City authorities and representatives of the security holders. The required public hearings were held on the Plan in tentative form before the Transit Commission on August 8, 9, 15, 16 and 22, 1939. At these hearings, representatives of all classes of security holders appeared and were heard; and after the close of these hearings, the Commission, by formal resolution, adopted the Plan after finding fair and equitable the offers to security holders contained therein (R., Vol. I, fols. 466-493). The Plan was then approved by the Board of Estimate of the City (R., Vol. I, fol. 494), and was executed by the City, by representatives of most of the security holders and by Manhattan Railway Company. In addition, it has since been executed by other representatives of security holders.

The Plan called for the securing of assents by the deposit of securities. The required percentages having been secured within the time specified in the Plan, the Transit Commission, by resolution adopted November 22, 1939, declared the Plan to be operative (R., Vol. I, fol. 1153). Finally, after the completion of the various procedural steps required for its consummation, including ex-

tensive proceedings before the District Court, a part of which are hereinafter discussed, the Plan was consummated on June 12, 1940.

(c) *The Nature of the Unification Plan.* In view of the attitudes of both the City and the security holders, it was out of the question for the City to acquire the transit properties in consideration of the payment of a lump sum, which would thereafter be split up among those who had an interest in the properties. On the one hand, the City was determined to use the new power granted it by the Constitutional Amendment, as well as the strategic position given it by the Circuit Court's disaffirmance decision, in such a way that no class of security holders, whose investments had gone to build up the City's transit system, should be excluded from participation in its Plan. Each class of security holders, on the other hand insisted that it negotiate its own treatment with the City and with the Transit Commission.*

The Plan adopted by the Transit Commission had these chief characteristics: First, it provided for an exchange of securities. Second, it provided that such exchanges should be on the stated bases which had been separately negotiated with the several classes of security holders by the City and the Transit Commission. Third, it permitted the City to acquire whatever securities might be deposited under it, regardless of their class or amount and regardless of whether the properties themselves were acquired under the Plan. Fourth, it made provision for a method of consummation which required assenters to deposit their

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* The offers to each class are shown in Judge Swan's opinion (R., p. 954).

securities for exchange, and also required the Contracting and Assenting Committees to agree to use their best efforts to bring about foreclosure and receivership sales and the settlement of the reciprocal claims, prior to the consummation of the Plan. And fifth, it provided that non-assenters should receive in cash their legal distributive shares, as determined by the Court, in the assets of the companies. Thus, in addition to meeting the City's requirement that it be permitted to negotiate separately the treatment to be accorded each class of security holders, the Plan assured the City of gaining prompt title to the properties themselves, it obviated protracted claims litigation in which the City had a substantial creditor interest, and it prevented security holders from having to make a blind decision as to whether or not to assent to the Plan.

(d) *Deposits Under the Plan.* The City's offers became effective when the Plan was formally adopted on August 29, 1939, and they were kept open until September 26, 1940. The following table shows the principal amounts or numbers of shares of the various classes of securities outstanding, the percentages thereof which were deposited under the Plan on November 22, 1939, when the Plan was declared operative by the Transit Commission (R., Vol. I, fol. 1158) and on June 4, 1940, just prior to consummation of the Plan (*ibid.*, fol. 1266) and the final percentage of deposits:

Name of Security	Principal amount or number of shares outstanding	Deposits at November 22, 1939	Deposits at June 4, 1940	Final deposits
Interborough First and Refunding Mortgage 5% Gold Bonds	$97,195,000	76.66%	94.76%	99.62%
Interborough Ten-Year Secured Convertible 7% Gold Notes	$31,672,100*	80.65%	95.29%	99.68%
Manhattan Consolidated Mortgage 4% Gold Bonds	$40,670,000	83.27%	97.56%	99.81%
Manhattan Second Mortgage 4% Bonds	$ 4,523,000	83.27%	84.98%	88.42%
Manhattan Guaranteed 7% Stock	43,510 shs.	27.55%	82.14%	96.26%
Manhattan Modified Guaranteed 5% Stock	556,490 shs.	63.27%	93.63%	99.10%
Interborough Ten-Year Unsecured 6% Gold Notes	$10,500,000	10.74%	29.19%	98.79%
Interborough Common Stock	350,000 shs.	9.40%	17.25%	96.59%

* Original principal amount of notes outstanding. As a result of payments on account of principal during the receivership, the principal amount of indebtedness represented by these notes had been reduced to $28,716,459.69.

The Status of the Petitioner Manheim.

Since the Unification Plan consisted of a series of offers by an outside purchaser to the holders of Interborough and Manhattan securities, its success depended entirely upon the voluntary acceptance of those offers by individual security holders. It was recognized from the outset that some might be unwilling to accept them. Provision was accordingly made for the payment to non-assenters of such amounts of cash as the District Court

should determine they were entitled to in accordance with their legal rights. As a result, foreclosure and receivers' sales were had, and in addition, after lengthy proceedings in which much evidence was taken and all persons affected were heard, the Court effected a settlement of the reciprocal Interborough-Manhattan claims, which were not sold in foreclosure and remained to be disposed of. These various proceedings resulted in the entry of orders and decrees which, among other things, determined that each non-assenting Second Mortgage Bondholder was entitled to receive, in cash, $394.68.

Manheim is a non-assenting holder of Second Mortgage Bonds. Those Bonds sold at very low prices for some years prior to the adoption of the Unification Plan. On March 31, 1938 their price on the New York Stock Exchange was $130, on March 31, 1939 it was $250, and on May 1, 1939, less than two months before the terms of the Unification Plan were announced, it was $260 (R., Vol. VI, doc. 34, Schedule C-2). Manheim nevertheless chose to reject the City's offer of $500 in Corporate Stock for each of his Bonds.*

The position taken by Manheim has been succinctly stated by Judge Swan (p. 955):

> "The scope of Manheim's appeal is restricted to those provisions of the court's orders which limit him as a non-assenting bondholder to the recovery of $394.68 per thousand dollar bond. He asserts no wish to upset the transfer of the properties to the City or to change the participation of assenting security holders, but he asks for an order directing that the bonds he owns or represents be paid in full,

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* The record does not disclose when, or at what prices, the bonds represented by Manheim were purchased, despite the fact that it has been held that minority bondholders who invoke the aid of a court of equity should fully disclose their status. See *Palmer* v. *Bankers Trust Company*, 12 F. (2d) 747, 754 (C. C. A. 8th, 1926).

> or, in the alternative, that a new hearing be granted to determine what amount in excess of $394.68 he is entitled to receive, or at least that he be given an amount equal to what he would have received had he assented to the Plan."

See to the same effect Manheim's Brief (pp. 3, 6-7).

We will have more to say later as to the fact that this petition presents no question of sufficient public interest or importance to warrant the issuance of a writ of certiorari by this Court. But first we wish to discuss briefly the proceedings which resulted in Judge Patterson's determination, unanimously affirmed by the Circuit Court, that the legal distributive share of each Second Mortgage Bond was $394.68.

POINT I.

Nothing about the Foreclosure of the Consolidated Mortgage Calls for Review by this Court.

As a Second Mortgage Bondholder, Manheim's position was junior to that of the holders of Manhattan's Consolidated Mortgage Bonds. It has never been disputed that the Consolidated Mortgage was a first lien on all Manhattan physical properties. Moreover, the Consolidated Mortgage has never been out of serious default since 1933, either for failure to pay interest or for failure to pay taxes or both.*

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* At the time of the entry of the Final Decree of Foreclosure and Sale on December 11, 1939 (R., Vol. I, fol. 559), there were the following defaults under the Consolidated Mortgage: (1) bond interest was in default to the extent of $3,253,586.24 (*ibid*, fol. 611); (2) $1,915,554.02 of taxes were unpaid and in default (*ibid*, fol. 614); (3) $8,950,260 had been paid in Consolidated Mortgage Bond interest and $2,503,736.40 had been paid in taxes under conditional forms of order which reserved the question of whether such pay-

As early as September 28, 1932 the trustee of the Consolidated Mortgage had commenced an accounting action to secure an impounding of all the rents, issues and profits of the mortgaged properties. Then, on March 16, 1934 the trustee filed a bill of foreclosure pursuant to leave of the District Court (R., Vol. VII, doc. 45, pp. 4695, 4699). There followed the appointment of a Special Master, who, after holding hearings and taking evidence, rendered a report on July 12, 1938, to which no exceptions were ever filed by anyone (*ibid.*, doc. 46, p. 10, 478).

At this time a crisis arose out of the City's threat to sell its tax liens on the Manhattan properties. There were then outstanding unpaid taxes of over $9,000,000. As the Circuit Court held on an appeal from the District Court, the City had full power to sell such tax liens. *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.*, 98 F. (2d) 72 (1938). To meet this threat, the Sixth Avenue line, the only earning elevated line, was sold for $12,500,000 upon partial foreclosure of the Consolidated Mortgage, and the defaulted tax liens of over $9,000,000 were paid with part of the proceeds. Judge Patterson, who presided in the District Court over the foreclosure proceeding now under attack, also presided over such partial foreclosure proceeding, which was bitterly contested at every point by Manhattan Railway Company, its stockholders and a small

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ments should ultimately be charged against the Manhattan properties ahead of the lien of the Consolidated Mortgage, so that such defaults were not unconditionally cured (*ibid*, fols. 611-614); (4) the trustee of the mortgage had had to pay $9,010,655.79 to The City of New York out of the proceeds of the sale of the Sixth Avenue line in order to save the mortgaged properties from being lost completely through the enforcement of tax liens which had accumulated from 1933 to 1938; and (5) the principal of the mortgage debt itself in the amount of approximately $40,670,000 had been duly declared due and payable and was in default (*ibid*, fol. 616).

minority of its bondholders. A most complete record was made before Judge Patterson on the matter of valuing the Sixth Avenue line, which necessitated a valuation of the Manhattan properties generally in order to fix consequential damages. The Circuit Court of Appeals affirmed Judge Patterson's decree and certiorari was later denied by this Court. *Manhattan Railway Company* v. *Central Hanover Bank and Trust Company*, 99 F. (2d) 789 (1938), *cert. denied* 306 U. S. 641 (1939).

Because of serious defaults, the principal of the Consolidated Mortgage Bonds was declared due on November 2, 1939 by the Merle-Smith Committee representing the holders of a majority of such Bonds (R., Vol. I, fol. 616), after the entry of an order approving such declaration (*ibid.* fol. 499) entered upon a petition praying for such approval (*ibid.* fol. 109). The mortgage trustee thereafter served and filed a supplemental complaint (*ibid.* fol. 523), bringing the defaults up to date, and Judge Patterson signed an order to show cause why a final decree of foreclosure and sale fixing upset prices should not be entered (*ibid.* fol. 536). Lengthy hearings were then held on November 27, December 5 and December 11, 1939, at which Manheim and his trustee were present.

Evidence was presented on all conceivable theories of valuation, and the fullest opportunity was given to all parties and interested persons to submit any evidence or to make any arguments which might have a bearing upon the fixing of the upset prices. We do not propose to review that evidence here. We do think, however, that the Court should be informed of the general nature and scope of the foreclosure record.

It suffices to mention briefly the testimony of the two principal witnesses and the exhibits introduced through

them. The first of these was Henry T. Berry, who had been Comptroller for Interborough and its receiver since 1924, prior thereto had been employed in the Accounting Department of Interborough beginning in 1903, and prior to 1903 had been in the Accounting Department of Manhattan (R., Vol. II, fols. 1838-1839). The second of these two important witnesses, George W. Burpee, was the member of the engineering firm of Coverdale & Colpitts in charge of work for Manhattan and had been connected with such work since 1921, had acted as engineer for the Manhattan receiver throughout the receivership and had testified in the formula proceeding and the proceeding involving the sale to the City of the Sixth Avenue elevated line (R., Vol. II, fols. 1939-1943).

The following is a tabulation of the more important evidence on valuations which was before the Court:

(1) *Earnings Record and Valuations Based Thereon:*

Results of operation of the Manhattan [elevated] Division, consisting chiefly of Manhattan mortgaged properties, including a breakdown of operating expenses, for the nine months ended September 30, 1939 (actual) and for the year 1939 (three months estimated), showing for the year an operating loss before taxes of $1,500,000 and after taxes and certain minor rentals of $3,797,000 (R., Vol. II, fols. 1840-1858, Vol. VI, doc. 32 and Vol. VIII, docs. 59 and 60).

Estimated operating results of Manhattan Division for year 1940, showing loss before taxes of $1,800,000 and after taxes and certain minor rentals of $4,100,000 (R., Vol. II, fols. 1859-1865, and Vol. VIII, doc. 61).

The decline of elevated income and earnings for the fiscal years ended June 30, 1934 to June 30, 1939 (R., Vol. II, fols. 1865-1869, and Vol. VIII, doc. 62). as follows,

the first line showing operating results before taxes and the second line showing results after taxes and certain minor rentals (italics indicating deficits):

1934	1935	1936	1937	1938	1939
$2,187,046	$1,595,463	$1,381,984	$ 916,925	*$ 445,330*	*$1,141,727*
144,144	*645,040*	*1,000,106*	*1,560,212*	*3,025,060*	*3,527,987*

Estimated results of operating Manhattan owned properties, as distinguished from those of the Manhattan Division, showing a net loss for one year before taxes of $861,000 and after taxes of $2,958,800 (R., Vol. II, fols. 1968-1985, and Vol. VIII, doc. 67).

Estimated results of operating only Third Avenue elevated line and Manhattan power plant for one year on assumption that Second Avenue line and Ninth Avenue line were condemned by the City pursuant to two statutes then recently enacted (New York Laws of 1939, Chapter 475 and 476), showing net revenue before taxes of $318,000 and a loss after taxes of $990,000.

Estimated results of operating Manhattan properties for one year with Interborough operating certain through train service under an assumed trackage agreement which conceivably could have resulted from negotiations with the City, in accordance with the disaffirmance decision of the Circuit Court of Appeals, showing income after taxes but before interest of $22,600 (R., Vol. II, fols. 1997-2011, and Vol. VIII, doc. 69).

(2) *Engineering Valuations:*

Historical cost of Manhattan properties ($111,000,000) and reproduction cost new at 1930 price levels ($163,000,000) (R., Vol. VIII, docs. 65 and 66).

Assessed value ($42,643,497), based principally upon engineering valuations and being contested in the State courts at the time the Unification Plan was adopted (R., Vol. II, fol. 2633).

(3) *Stock Market Appraisal:*

Schedule showing price ranges of Consolidated Mortgage Bonds on New York Stock Exchange from December 1, 1933 to November 15, 1939, with a low of $7,320,600 ($180 per Bond) at March 31, 1938, and a high of $30,705,850 ($755 per Bond) at November 15, 1939, and showing that such prices rose and fell with the hope of unification (R., Vol. VI, doc. 33).*

(4) *Scrap Values:*

Scrap value of $326,000 to $350,000 for Manhattan system apart from power plant and miscellaneous real estate, and value to Interborough of $6,000,000 to $8,000,000 for power plant if, in the future, it wished to purchase a plant producing power of low frequency which could not be adapted to other than transit uses without a "large expenditure" (R., Vol. II, fols. 1958-1968).

Finally, Mr. Burpee testified as to his expert opinion on the value of the Manhattan properties (R., Vol. II, fols. 2022-2025). He stated that he took into consideration the fact that unification was a very real probability, the possibility of a new arrangement between Interborough and Manhattan for the continuation of through service

* The stock market appraisal of course included not only the physical properties but also the sum of approximately $6,400,000 held by the Trustee of the Mortgage and the claims of the Consolidated Mortgage Bonds against Interborough, ultimately settled at approximately $6,666,000 in cash (R., Vol. I, fols. 1232-3).

at a 5¢ fare, the various estimated results of operating Manhattan independent of Interborough, or of operating merely the Third Avenue line and power plant in the event that the Second and Ninth Avenue lines were condemned, the rising trend in wages and in fuel and material costs, the general downward trend in traffic, the order of the Transit Commission requiring the expenditure of $3,625,000 to $4,360,000 for the installation of signals, the stock market appraisal of the property, etc. With all these factors before him, he stated that he would advise the owners of the Manhattan properties, who already had their investment in the properties, that he would regard a fair price to be between $15,000,000 and $20,000,000. He further stated, however: "I would not advise any purchaser other than the City of New York to pay that price, no, sir."

Brief as it is, the foregoing tabulation and discussion is sufficient to show the misleading character of Manheim's statement (Brief, p. 13) that "the Manhattan properties were sold at an upset price fixed by the District Court on the basis of testimony given that very day by a single expert * * *." Any statement or inference that the Manhattan upset price was fixed after only cursory consideration by the Court is so completely at variance with the facts as to be without extenuation or excuse. The demonstrable fact is that every conceivable basis of valuation was in the record. Manheim himself has never been able to point to any theory of valuation or evidence on valuation which is not in the record.

Plainly, the price of $17,000,000 which Judge Patterson fixed for the Manhattan physical properties was eminently fair and adequate, and the Circuit Court of Appeals was completely correct in its statement that "Complaint as to the upset price of $17,000,000 is not justified" (R. 956).

We do not concede that there is any validity in Manheim's attempt to test the Manhattan upset price against the offers to security holders made in the Plan. However, if the Manhattan upset price is to be tested against the Plan, the upset price certainly is not out of line. The amount which would have gone to the Consolidated Mortgage Bondholders under the Plan, assuming that they all assented, was $33,552,750, payable chiefly in City Corporate Stock (R., Vol. I, fol. 460). If we deduct from that sum the $6,400,000 of cash held by the mortgage trustee, and the $6,666,000 for which the claims of these Bonds were settled, the resulting figure is in the neighborhood of $20,000,000. And this is $20,000,000 payable chiefly in Corporate Stock, as against $17,000,000 payable entirely in cash. Here, as throughout his brief, Manheim relies upon the obvious fallacy that there is complete equivalence between Corporate Stock and cash. But, as the Circuit Court of Appeals pointed out, the City was not a purchaser for cash, and the assenting security holders undertook the risk of the City's credit (R., pp. 958-959). The Unification Plan was consummated at a time when the City's 40-year 3% Corporate Stock, payable on June 1, 1980, was selling at 90. A week before it had sold at 88¼. Between that time and the present there has been a spread of 23½ points between its low of 88¼ and its high of 111⅝. With such a spread in a period of approximately 1½ years, it is obvious that those who agreed to accept these securities in lieu of cash were assuming a very real risk. Indeed in September, 1933, at which time the City had outstanding no long term 3% Corporate Stock, the City's 4½'s of 1981 sold as low as 68, or on a yield basis of 6.25%. City securities of the same maturity, but bearing a 3% and not a 4¼% coupon, would have sold at 52½ to give the same

yield. And prices of 68, 60 and 52½ for $151,000,000 of Corporate Stock result in values of $102,680,000, $90,600,000 and $79,285,000, respectively. These considerations give full support to Judge Swan's opinion, in which he said (R., pp. 958-959):

> "The recipients of Corporate Stock did not, it is true, get securities representing a risk in the reorganized business only, but they did undertake the risk of the City's credit. As such we think their position analogous to that of assenters in the ordinary receivership reorganization, justifying their participation at a larger percentage of the face amount of their claims than the cash shares of dissenters."

Even upon the basis of the Plan figures and disregarding the fact that under the Plan securities had to be accepted in lieu of cash, Manheim is an impossible distance from boosting the foreclosure price from $17,000,000 to $31,000,000, which it would have to be if, added to the $6,400,000 and the $6,666,000 referred to above, it was to result in the payment of the $44,244,000 due for principal and interest on the Consolidated Mortgage Bonds. On no conceivable theory could the upset price be raised to that amount. Manheim is not a holder of Consolidated Mortgage Bonds, but only of Second Mortgage Bonds. If the upset price should have been $20,000,000 or $25,000,000 or even $30,000,000, instead of $17,000,000, only a dissenting Consolidated Mortgage Bondholder could object. Unless the upset price should have been in excess of $31,000,000, a dissenting Second Mortgage Bondholder could not be benefited by a re-trial of the foreclosure case, and he has no standing to complain.

One word more should be said concerning Manheim's treatment of the Manhattan upset price. It is to be observed

that nowhere does he set forth any analysis of the evidence which would indicate justification for a higher price. As in the courts below, he contents himself with the mere assertion that the sum of the City's offers to both Interborough and Manhattan security holders under the Plan was $164,000,000, that the sum of the amounts payable in cash to both Interborough and Manhattan non-assenters is $97,000,000, and that therefore (a *non sequitur*) the Manhattan upset price should be higher. The reason why Manheim does not analyze the evidence on actual values is that any such analysis shows clearly that the $17,000,000 upset price for these obsolete elevated lines was an exceedingly liberal price. We do not admit that the upset price fixed upon foreclosure of the Interborough Mortgage was inadequate or unduly low in the light of the unique circumstances there presented. But if there be any validity in Manheim's contention that the sum of the Interborough and Manhattan upset prices plus the total amount at which the claims of the respective classes of the Manhattan securities were settled should have approached more nearly what he calls the "Plan price," then it is obvious that any such insufficiency or inadequacy is a result of the upset price fixed for the Interborough properties and not in any degree whatever of the price fixed for the Manhattan properties. If we assume *arguendo* that the less than ½ of 1% of the Interborough bondholders who did not assent received less than the full measure of their legal rights, Manheim as a Second Mortgage Bondholder of Manhattan certainly has no standing to complain on their behalf.

POINT II.

Manheim Fails Utterly to Show any Legal Question Requiring Review by This Court on the Matter of the Enforcement of the Manhattan Second Mortgage Bond Claims against Interborough.

(1)

Manheim's further attack is on the amount determined to be payable on the claims of the Manhattan Second Mortgage Bonds against Interborough. His argument on this point is founded almost entirely upon his assertion of unjust treatment because payments were also made upon the creditor claims of the Manhattan stockholders against Interborough.

Such assertion is based upon a premise which is demonstrably fallacious. The Transit Commission, the City, the parties to the Unification Plan, the District Court and the Circuit Court of Appeals have all recognized that both for purposes of the Plan and for purposes of enforcement of their legal rights, not one cent was given to Manhattan stockholders as Manhattan stockholders. Their only participation in the Plan, and the only payments made to them upon enforcement of their legal rights, were accorded them in their capacities as direct contractual creditors of Interborough.

Manheim can cast no doubt on the well-established status of the stock by stating or assuming, inaccurately, that such status is undecided (Brief, pp. 5, 15). The holders of this very Manhattan stock have been determined by the courts of New York to have a direct contractual claim against

Interborough—a claim which is not derivative and which need not be enforced through the Manhattan Company.

Peabody v. *Interborough Rapid Transit Company,* 212 App. Div. 502 (1st Dep't, 1925);

Peabody v. *Interborough Rapid Transit Company,* 124 Misc. 801 (Sup. Ct., N. Y. Co. 1924) aff'd without opinion 213 App. Div. 857 (1st Dep't 1925), aff'd without opinion 240 N. Y. 708 (1925);

Bowers v. *Interborough Rapid Transit Company,* 121 Misc. 250 (Sup. Ct., N. Y. Co., 1923), aff'd without opinion 208 App. Div. 768 (1st Dep't 1924).

Actually, it would have been immaterial if the status of the Manhattan stockholders as creditors of Interborough had been doubtful and uncertain. Even without the decisions cited above there could have been no question that the Manhattan stockholders had at least a very real, colorable claim to be treated as direct contractual creditors of Interborough. And if such claim had been disputed by Manheim, certainly the Court would have had full power to determine the issue by compromise and settlement. This power of the Court was recognized by Judge Swan, when he said (R., p. 960) that the settlement order "established by compromise the legal rights of the Manhattan stockholders to share as creditors, so that now their status as such cannot be questioned."

(2)

The settlement and determination of the specific amounts payable upon the claims of the respective classes of Manhattan security holders against Interborough were made only

upon the most complete record and with the fullest opportunity given to all security holders to present proofs of claim, introduce evidence, and be heard in argument. Moreover, the Second Mortgage Bonds were fully represented before the Court, not only by counsel for the petitioner Manheim, but also by Chase Bank as Trustee of the Manhattan Second Mortgage, by Curtis, Belknap & Webb, representing a majority of the Second Mortgage Bonds, and by the Wassner Committee for such Bonds, all of whom participated actively in the hearings.

It is impossible within the confines of this brief to do more than tabulate the various matters upon which full evidence was before the Court. All the documents having any bearing on the claims were before it—the lease, all supplements thereto and modifications thereof, the two Manhattan mortgages, the various franchise contracts with the City of New York. The seven proofs of claim filed on behalf of the various Manhattan interests and on behalf of the Interborough receiver, including answers thereto (R., Vol. V, docs. 20 to 26), were before the Court. The various formulas for the determination of the amounts to which Manhattan should be entitled for use of its property during the receivership period, and the 3,625 pages of testimony and 203 exhibits in the formula proceeding, were made part of the record on claims (R., Vol. V, docs. 27 to 29, and Vol. II, fol. 2342). Complete schedules showing rental items due under the Manhattan lease to various dates which were claimed to be applicable by various parties were in evidence (R., Vol. VI, doc. 38 and Vol. II, fols. 2253 and 2258).

The lack of earnings of the elevated lines was shown by schedules and supported by expert testimony (R., Vol. VIII, docs. 60, 61 and 62, and Vol. II, fols. 1865-1869, 2258-2263). The results of applying the Manhattan receiver's

formula (R., Vol. II, fols. 2342-2369, and Vol. VIII, doc. 80) and of the Interborough receiver's formula (R., Vol. II, fols. 2540-2542, and Vol. VIII, docs. 84 and 85) were in evidence. There were also in evidence the results of operating the entire Interborough system after deducting losses from the operation of the elevated lines (R., Vol. VIII, docs. 70, 71 and 72, and Vol. II, fols. 2263-2266).

The record also contained full testimony and other evidence on the following matters:

materials and supplies turned over to Interborough by Manhattan at the commencement of the term of lease (R., Vol. II, fols. 2290-2291);

rolling stock turned over to Interborough at the commencement of the lease, its value, condition and cost of replacing outmoded rolling stock (R., Vol. II, fols. 2303-2328, 2575-2585, 2593-2602, Vol. VIII, docs. 74, 75 and 76);

the condition of the elevated structure and stations (R., Vol. II, fols. 2328-2336, 2553-2561, Vol. VIII, docs. 77 and 78);

the cost of restoring Manhattan power facilities which had been dismantled by Interborough (R., Vol. II, fols. 2337-2342, and Vol. VIII, doc. 79);

the various claims of the Manhattan Modified Stock (R., Vol. II, fols. 2278-2285, 2436-2461, and Vol. VI, docs. 39, 40 and 41);

the damage claimed by Manhattan because of the taking of the Sixth Avenue elevated line in order to pay over $9,000,000 of delinquent taxes in 1938 (R., Vol. II, fols. 2462-2467, 2617-2618);

claims of the City based upon alleged improper accounting by Interborough under the main subway operating contract (R., Vol. II, fols. 2489-2493, and Vol. VIII, docs. 81 to 83);

the order of the Transit Commission requiring installation of automatic signals on elevated lines at an estimated cost of $3,625,000 to $4,360,000 (R., Vol. VIII, doc. 63); and

Interborough's claims against Manhattan for improvements upon Manhattan properties (R., Vol. II, fols. 2506-2511, 2519).

In addition to all the foregoing evidence, the Court had before it the important considerations arising out of the decision of the Circuit Court of Appeals having to do with the franchise rights of the City against Interborough and with the disaffirmance of the Manhattan lease. *Murray* v. *Roberts,* 103 F. (2d) 889 (1939), petition for certiorari dismissed per stipulation, 311 U. S. 720 (1940).* Moreover, Judge Patterson had before him an application by the Interborough receiver for an interpretation of the disaffirmance decision which would have rendered illusory that decision's apparent benefits to the Manhattan parties. Judge Patterson also knew that the Interborough interests contended strongly that, far from being entitled to the claimed priority for past due rentals, Manhattan must respond to Interborough for its operating losses under the well-established "net earnings rule"; and he knew also that Interborough claimed to be entitled to an offset of some

* Manheim's brief is both incorrect and misleading in saying, at page 23, that under this decision the Manhattan lease could not be disaffirmed unless Manhattan and the City consented. Manhattan alone was powerless to prevent such disaffirmance; for there can be no shred of doubt that, had the City relieved Interborough of all or any part of the franchise obligations which Interborough owed the City, Manhattan would have been entirely helpless and would have had to be content with anything the City and Interborough agreed upon. Manhattan's properties were running at a loss; any operation which would have kept them running and prevented a complete loss through tax lien foreclosures would have been a welcome boon.

$42,000,000 against certain of the more important claims of Manhattan.

It was with such a complete record and after full argument that Judge Patterson determined the amounts which the respective classes of Manhattan security holders should be entitled to collect on their claims. The amount allowed to holders of Second Mortgage Bonds was $1,785,000, or $394.68 per $1,000 Bond.

Neither here nor in the Circuit Court of Appeals nor in the District Court has Manheim analyzed or even listed the Second Mortgage claims upon which he relies. Instead, as stated above, he relies entirely upon his fallacious premise that the Second Mortgage Bonds should be entitled to more because persons who were Interborough contractual creditors, and who were paid as such, happened also to be Manhattan stockholders. This argument Judge Swan forcefully rejected, saying (R., p. 960):

> "As participation of Manhattan stockholders was in the capacity of general creditors of Interborough, a status not inferior to the Manhattan Second Mortgage bonds, it cannot be attacked by Manheim as a holder of such bonds."

(3)

There is no mystery about the legal basis on which Manheim and the other Second Mortgage Bondholders are bound by the order of March 15, 1940, settling the claims. There are three distinct and well-recognized grounds underlying that order.

(a) A court of equity in a receivership proceeding has broad equity powers to dispose of controversies by compromise and settlement. The procedure adopted here was patterned upon the doctrine which has been given expression

in the opinion of this Court in *Case* v. *Los Angeles Lumber Products Co., Ltd.*, 308 U. S. 106 (1939), where this Court said (p. 130):

> "There frequently will be situations involving conflicting claims to specific assets which may, in the discretion of the court, be more wisely settled by compromise rather than by litigation. Thus, ambiguities in the wording of two indentures may make plausible the claim of one class of creditors to an exclusive or prior right to certain assets as against the other class in spite of the fact that the latter's claim flows from a first mortgage. Close questions of interpretations of after-acquired property clauses in mortgages, preferences in stock certificates, divisional mortgages and the like will give rise to honest doubts as to which security holders have first claim to certain assets. Settlement of such conflicting claims to the *res* in the possession of the court is a normal part of the process of reorganization. In sanctioning such settlements the court is not bowing to nuisance claims; it is administering the proceedings in an economical and practical manner."

Similarly, in the more recent case of *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 523 (1941), although this Court condemned as a "concealed compromise" the device of merely extinguishing claims without notice to the parties and without a proper record before the court, this Court recognized that "the claim might be settled, with the approval of the Court after full disclosure and notice to interested parties * * *."

The direction of this Court in the *Los Angeles Lumber Products Co.* case, *supra*, is that the chancellor should administer proceedings "in an economical and practical manner." The chance in this case for non-assenters as well as assenters to realize substantial values on Man-

hattan claims presented itself only because of the City's desire for unification.* The City repeatedly stated that because of world and market conditions unification would have to be accomplished promptly or not at all. It gave no assurance that its offers would not be withdrawn. Its offers were conditioned upon prompt and final settlement of the claims litigation. Neither the City, the Interborough 5% Bondholders nor the Interborough 7% Noteholders (the senior securities of Interborough) were willing to bind themselves to a plan which left undetermined the extent of ultimate liability which one or more of them might have had to pay had the claims been left to future litigation. The claims were therefore in the nature of perishable or disappearing assets and had to be dealt with promptly. They had to be determined not only as a part of the foundation for the Court's action on the Plan, but also because the only alternative to a plan conditioned upon prompt settlement of the claims was no plan at all. That alternative spelt disaster for security holders of all classes, particularly Manhattan security holders. Accordingly, given the full and exhaustive record which was made

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* This Manheim concedes, although he fails to grasp its significance. On page 23 he says:

> "The City was, of course, the highest and only real bidder for the properties of the two companies on liquidation and, if it had not bid, all the security holders might well have fared worse * * *."

That the City was the only possible purchaser who was willing to pay anything approaching the total of the unification offers in order to acquire the Interborough-Manhattan transit properties is abundantly clear from the record and is one of the controlling facts in this case. This was recognized by Judge Swan when he said that (R., p. 961):

> "* * * it is obvious that every security holder is faring far better than ever would be the case but for the interest of the City."

before him, there can be no doubt of Judge Patterson's power to settle these claims.

(b) Manheim had no direct contractual right against Interborough. His sole hold on the claims was through his Mortgage Trustee; they were additional security under his mortgage. The claims, therefore, were property which the Second Mortgage Bondholders as a class were entitled to have dealt with for their benefit the same as any other property subject to the lien of their mortgage.

The Second Mortgage contained explicit provisions that a majority of the Bondholders could direct the taking of any action relative to enforcement of the security under that mortgage (R., Vol. IV, p. 961). Accordingly, pursuant to the direction of a majority of the Bonds (R., Vol. I, fol. 1351), the Trustee filed a petition (R., Vol. I, fol. 1327) which, after referring to the fact that the Manhattan physical properties were being sold upon foreclosure of the Consolidated Mortgage, and that the Court had entered an order on March 15, 1940 determining the amount to which Second Mortgage Bondholders should be entitled on their claims, alleged that foreclosure of the Second Mortgage would be futile and unnecessary, and prayed for the entry of a decree in accordance with the prayers of the petition. On June 10, 1940, the decree so prayed for was entered (R., Vol. II, fol. 1363). It provided as follows:

> (a) that the foreclosure of the Second Mortgage would be a futile and unnecessary act;
>
> (b) that the proceedings theretofore had leading up to the court's order of March 15th on the claims were tantamount to a foreclosure of the Second Mortgage on the claims against Interborough asserted in the proof of claim of the trustee of the Second Mortgage;

(c) that payment for the account of holders of Second Mortgage Bonds of the amount allowed on such claims should constitute a final determination of the rights of the trustee and of the holders of Second Mortgage Bonds; and

(d) that no further acts or proceedings were necessary for the enforcement of such rights.

Manheim was represented by his counsel at the hearings leading up to this decree, and his counsel participated in the argument on this matter. He was likewise represented in the seven days of hearings on the claims. It is clear that he has had his full day in Court and that his mortgage has been completely and properly enforced.

(c) Judge Patterson's decision is also supported by Rule 23 of the Rules of Civil Procedure, which provides, in part:

"(a) If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

* * * * * *

"(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

"(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

* * * * * *

"(c) A class action shall not be dismissed or compromised without the approval of the court."

Since we are dealing here with bondholders, the presence of the Trustee alone satisfied the requirement of adequate representation before the Court. However, as we have pointed out above, not only did the Trustee take part in the proceedings relative to the claims, but so did the representatives of a majority of the bonds, the Wassner Committee representing a minority of the Bonds, and Manheim himself. Moreover, the hearings were held upon notice to security holders both by mail and by publication.

Manheim's contention that Rule 23 was not properly invoked for the purpose of bringing a class action binding upon him is a contention which he is not in a position to make, since he participated in the proceedings. *Hansberry* v. *Lee*, 311 U. S. 32 (1940). In that case, this Court wrote (pp. 42-43):

> "It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or *where they actually participate in the conduct of the litigation in which members of the class are present as parties* * * *." (Italics inserted.)

(4)

Manheim makes one further assertion which is sprinkled throughout his brief and which has no support in fact: that is, that the non-assenting bonds were in a class separate from the assenting bonds for the purpose of settling the claims litigation. This is simply not the case. The assenters under the Plan were as vitally interested in the subject matter of the claims as were the non-assenters. It was essential to the assenters that the claims litigation be determined and definitely disposed of in a manner conso-

nant with accepted legal principles. The Plan, at the insistence of the City, required this in express terms.

Manheim can no more validly contend that he is a member of a separate class for the purposes of the claims litigation than he could have contended that he was a member of a separate class in the fixing of an upset price upon foreclosure of his Mortgage. In claiming to be in a separate class Manheim overlooks the fact that the Second Mortgage Bondholders all held bonds of an identical series, issued under the same Mortgage, and containing throughout identical terms and provisions. Such bondholders all looked to the same property, the same security and the same documents for the enforcement of their rights. They were clearly members of an identical class, and the mere fact that subjectively a minority of them analyzed their rights differently from the others could not alter their class membership.

We desire to point out once more that it would be impossible to make more completely informative the record on which the District Court acted. Manheim's sole hope is that by having this Court review the claims litigation, he will be afforded a new winnowing of this vast and complicated mass of factual data and a reinterpretation of the unique contracts and franchises pertaining to New York City's unique rapid transit system. Through such a reexamination, he hopes that the City of New York will have to pay him more than the liberal amount which he has refused to accept. But he points to nothing which would tend to support that hope.

POINT III.

No Questions of Public Interest or Importance Are Presented to Justify Granting the Petition. On the Contrary, This Case Presents a Situation Where It Is Abundantly Clear That the Court Should Not Exercise its Power to Grant a Writ.

(1)

This case is *sui generis* if any case ever was. In the first place, the relationships between the City, Interborough, Manhattan, and the security holders of both companies stem from a most unusual and distinctive group of franchises, contracts and related certificates which were issued by the State of New York for the express purpose of regulating the relationships between those companies and the City. The Legislature set out in great detail the precise content of those documents, and they have repeatedly come before both the Federal and State Courts for construction. Their interpretation is not only a matter of State law, but is of interest to no one but the parties to this litigation. Moreover, as the properties of the two companies are now in public ownership and operation, and the franchises and contracts in question have now been terminated, no further questions can hereafter arise with respect to them.

In the second place, there is involved here the meaning and effect of language used in the 1903 lease by which Manhattan leased its lines to Interborough. That document is nothing more than a private contract respecting the unusual transit situation then existing in New York City. The interpretation of that lease is of no concern to anyone other than the litigants in this particular proceeding—especially as the lease has now been wiped out by

the consummation of the Unification Plan. Moreover, as we have already pointed out, the New York State Courts have more than once decided, adversely to Manheim, the question of whether, under this very lease, Manhattan's stockholders occupied the status of direct contractual creditors of Interborough.

In the third place, this case arises out of the consummation of a Unification Plan, prepared and adopted by an independent State agency pursuant to the specific provisions of the Public Service Law of the State of New York. This Court has said before that "federal courts of equity should exercise their discretionary powers with proper regard for the rightful independence of state governments in carrying out their domestic policy." *Pennsylvania* v. *Williams*, 294 U. S. 176, 185 (1935). That principle should be applied here, at least to the point of recognizing that no reason exists for reviewing a unanimous decision of the Circuit Court of Appeals holding that the State of New York has fairly and equitably carried out its purpose of reducing these transit properties to public ownership and control, and making adequate provision for those interested in them.

(2)

This case, with its highly unique facts, will come as close as possible to existing as a law unto itself. Chapter X and Section 77 of the Bankruptcy Act have absorbed almost all reorganization cases into their more advantageous statutory procedures. There is no likelihood, therefore, of widespread public interest in the legal effect of the decision of the instant case, which, as we have said, in any event arises out of a set of facts and circumstances which are peculiarly unique.

Apparently aware of the particularly restricted nature of the issues which he seeks to raise, Manheim has gone far afield in an effort to find situations to which their decision might be applicable. He purports to find such applicability in proceedings under Section 11 of the Public Utility Holding Company Act of 1935 and in proceedings under the Bankruptcy Act (Brief, p. 25).

There is no real similarity between this case and cases under those statutes. In the first place, the typical integration and simplification proceedings under Section 11 of the Holding Company Act have to do with solvent and even prosperous companies. No bankruptcy or receivership is normally involved. Manhattan, on the other hand, was hopelessly insolvent, and its securities had values which were supported almost solely by the incidental benefits which they derived from the City's franchise rights against Interborough—rights which the City stood ready to yield at any time if Manhattan proved unreasonable in the light of its precarious position. Moreover, as we have stated above, the questions which were presented in this case arose out of a unique series of inter-related documents which grew up with the City's rapid transit system and which never have been and never will be duplicated elsewhere.

Manheim ignores all these facts when he asserts that this litigation is important to proceedings under the Bankruptcy Act and the Holding Company Act. His point therefore is without merit.

(3)

It is true that transit unification was a matter which affected the welfare of all the citizens of the City of New York, as well as the security holders of Interborough and Manhattan. So important did the Legislature consider its

accomplishment, that it declared a public emergency to exist until it was accomplished. But these considerations have nothing to do with the present application. Its scope is extremely limited, and is of no public interest or importance whatsoever.

Manheim has made it clear that he has no desire to upset or to change the Unification Plan. He raises the single question of whether non-assenting holders of Second Mortgage Bonds are entitled to more than $394.68 in cash as their distributive share in Manhattan's assets. Thus the issue which he raises is one which concerns only himself and the few Bondholders whom he represents. And, furthermore, he adduces nothing by way of proof or analysis to show that $394.68 represents an inadequate and unfair valuation of Bonds which were junior to a mortgage which was in default to the extent of $44,244,000.

In reality, Manheim has only one cause for dissatisfaction, and for that he has only himself to thank. The City, in pursuance of its determination that it would separately negotiate with each class of security holders terms for the exchange of securities which would result in generous treatment for all, has offered Second Mortgage Bondholders more than they could have received through any other solution of the litigation. That offer, which was kept open for more than a year, Manheim was foolish enough to reject. Having made that decision, he must now abide by it. As Judge Swan said in the Circuit Court of Appeals (R., p. 958):

> "Hence, if the upset price represented a fair valuation, as we have shown that it did, and all security holders were given an adequate and equal opportunity to come in, as they were, we do not think a security holder who elected to take cash can com-

plain because the City was ready to pay a higher price to security holders who were willing to exchange their old securities for Corporate Stock."

POINT IV.

The petition should be denied.

Dated, New York, January 12, 1942.

Respectfully submitted,

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